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No. 05-998

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JUAN RESENDIZ-PONCE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL REPLY BRIEF FOR THE UNITED STATES

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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TABLE OF AUTHORITIES

Page

Cases:

Cheek v. *United States*, 498 U.S. 192 (1991) 9
Cochran v. *United States*, 157 U.S. 286 (1895) 5
Costello v. *United States*, 350 U.S. 359 (1956) 5
Hamling v. *United States*, 418 U.S. 87 (1974) 2
Russell v. *United States*, 369 U.S. 749 (1962) 4, 5, 7
Stirone v. *United States*, 361 U.S. 212 (1960) 4
United States v. *Britton*, 107 U.S. 655 (1883) 5
United States v. *Carlos-Colmenares*, 253 F.3d 276 (7th Cir.), cert. denied, 534 U.S. 914 (2001) 8
United States v. *Cruikshank*, 92 U.S. 542 (1876) 4
United States v. *De León*, 270 F.3d 90 (1st Cir. 2001) 9
United States v. *Gracidas-Ulibarry*, 231 F.3d 1188 (9th Cir. 2000) 8, 10
United States v. *Hess*, 124 U.S. 483 (1888) 4
United States v. *Morales-Palacios*, 369 F.3d 442 (5th Cir.), cert. denied, 543 U.S. 825 (2004) 9
United States v. *Peralt-Reyes*, 131 F.3d 956 (11th Cir. 1997), cert. denied, 523 U.S. 1087 (1998) 9
United States v. *Rodriguez*, 416 F.3d 123 (2d Cir. 2005), cert. denied, 126 S. Ct. 1142 (2006) 9
United States v. *Simmons*, 96 U.S. 360 (1878) 4
United States v. *Stavroulakis*, 952 F.2d 686 (2d Cir.), cert. denied, 504 U.S. 926 (1992) 6

Constitution, statutes and rule: Page

U.S. Const.:
Amend. V 8
Grand Jury Clause 2, 3
Amend. VI 3
8 U.S.C. 1326 3
8 U.S.C. 1326(a) 3, 7, 8, 9, 10
Fed. R. Crim. P. 7(c)(1) 6

Miscellaneous:

Model Penal Code § 5.01(1)(c) (1962) 2

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In his supplemental brief, respondent does not contend that the indictment in this case was deficient because it did not allege, in so many words, that respondent took a "substantial step" toward unlawful reentry. Instead, he contends only that the indictment provided insufficient notice because it failed to *specify* what step (or steps) respondent had taken. That contention lacks merit, because the indictment set forth the charged offense with reasonable factual particularity, which is all the notice that the Constitution requires. Respondent's remaining contention—that the offense of attempted unlawful reentry requires "specific intent"—is irrelevant to the disposition of this case. As respondent acknowledges, respondent has forfeited any claim that the indictment was deficient because it failed expressly to allege that respondent acted with "specific intent." In any event, the offense of attempted unlawful reentry

requires a showing only that the defendant had the intent to reenter the country, not that the defendant also had knowledge that he lacked the consent of the Attorney General (or the Secretary of the Department of Homeland Security). The decision of the court of appeals should be reversed either on the ground that the indictment was constitutionally valid or on the ground that, even assuming that the indictment was invalid, any error was harmless.

1. As the government's supplemental brief explained (at 2-11), the indictment in this case satisfied the Grand Jury Clause's requirement that an indictment charge every element of a criminal offense. To meet that requirement, it was sufficient that the indictment alleged that respondent "attempted" to reenter the country unlawfully, without specifically alleging that respondent took a "substantial step" toward completion of the offense of unlawful reentry. As this Court has repeatedly recognized, it is ordinarily sufficient if an indictment "set[s] forth the offense in the words of the statute itself." *Hamling* v. *United States*, 418 U.S. 87, 117 (1974). Because "attempt" is a term of art with a "definite * * * meaning" in federal criminal law, *id.* at 118-119—including that the defendant took a substantial step toward completion of the corresponding substantive offense, see Model Penal Code § 5.01(1)(c) (1962)—the indictment for an attempt offense need not recite that the defendant took such a "substantial step" in order to comply with the Grand Jury Clause.

Respondent contends only that "use of the term 'attempt' in a [federal criminal] statute necessarily requires a showing of a substantial step." Supp. Br. 4-5. That is undoubtedly true, as reflected by the numerous cases so defining "attempt" in the context of various

federal attempt offenses. See U.S. Supp. Br. 6-7 n.5. But it does not follow—nor does respondent contend—that an indictment that fails to allege, in so many words, that defendant took a "substantial step" toward completion of the corresponding substantive offense is necessarily invalid. Indeed, respondent freely concedes that "attempt" has "a well-established common law meaning," Supp. Br. 13—or, at a minimum, that "attempt" has a settled modern meaning, as reflected in the Model Penal Code's definition of the term, see *id.* at 14-15. Because Section 1326's text prohibits an "attempt" to reenter the country unlawfully, and because it is well established that a federal "attempt" offense requires a substantial step toward the completion of the offense, the indictment in this case sufficiently charged the conduct element of the offense by alleging that respondent "attempted" to reenter the country unlawfully.[1]

2. As the government's supplemental brief explained (at 11-23), the indictment in this case also satisfied the constitutional requirement (rooted primarily in the Sixth Amendment but also in the Grand Jury Clause) that the defendant be provided with sufficient factual detail concerning the charge against him so as to enable him to prepare his defense. An indictment need only set forth the alleged crime "with reasonable particularity of

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[1] Respondent contends that the government has "waived any argument that a section 1326 attempt does not require a substantial step." Supp. Br. 12. The government, however, has never disputed that an "attempt" under 8 U.S.C. 1326(a) requires a substantial step toward completion of the offense of unlawful reentry. Instead, the government has consistently maintained that the *indictment* sufficiently alleged the conduct element of the offense by alleging that respondent had "attempted" to reenter unlawfully. See, *e.g.*, Gov't C.A. Br. 10-11 (court of appeals); J.A. 13-14 (district court).

time, place, and circumstances." *United States* v. *Hess*, 124 U.S. 483, 488 (1888) (quoting *United States* v. *Cruikshank*, 92 U.S. 542, 558 (1876)). The indictment in this case identified the date and place of the attempted unlawful reentry, and those factual details were sufficient to enable respondent to prepare his defense. This Court has rejected the argument that an indictment must specify the "particular means" by which a crime has been committed, see *United States* v. *Simmons*, 96 U.S. 360, 364 (1878), and lower courts have routinely rejected the precise argument that an indictment for a federal attempt offense must allege the acts or means by which the defendant attempted to commit the corresponding substantive offense, see U.S. Supp. Br. 15-18 (citing cases). The indictment therefore provided respondent with sufficient factual detail concerning the charge against him.

Respondent contends that this Court's decision in *Russell* v. *United States*, 369 U.S. 749 (1962), requires that an indictment must "descend to particulars." Supp. Br. 2 (quoting 369 U.S. at 765). Based on that language, respondent suggests that the Constitution requires an indictment to provide not merely enough factual detail to enable a defendant to prepare his defense, but enough factual detail to allow a reviewing court to verify that the evidence presented at trial was consistent with the evidence presented to the grand jury. See *id.* at 8 (stating that, "even if the constitutionally-mandated apprisal function could be satisfied by the minimal allegations made here, the right to be tried on only the grand jury's actual findings is lost"). That approach, however, cannot be squared with this Court's numerous decisions stating that an indictment can be drawn "in general terms," *Stirone* v. *United States*, 361 U.S. 212, 218 (1960), and

need not include all of the facts that the government intends to prove at trial, see, *e.g.*, *Cochran* v. *United States*, 157 U.S. 286, 290 (1895); *United States* v. *Britton*, 107 U.S. 655, 663 (1883).[2] It is also difficult to reconcile with the rule that a defendant may not challenge the sufficiency of the evidence presented to the grand jury. See, *e.g.*, *Costello* v. *United States*, 350 U.S. 359, 363-364 (1956). This Court's decision in *Russell* did not purport to abrogate or modify the general rule that an indictment need only set forth the alleged crime with reasonable factual particularity. Instead, it held that an indictment must provide additional factual detail concerning an element when such detail is truly necessary to apprise the defendant "of what he must be prepared to meet." See 369 U.S. at 764. For example, an indictment for perjury must not only allege that a defendant testified falsely, but also identify the specific testimony alleged to be false. But *Russell* does not support the sweeping proposition that, regardless of the crime charged, an indictment must allege specific factual detail about every element—let alone respondent's claim that an indictment must allege *all* of the factual particulars that the grand jury may have found in returning it.[3]

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[2] Perhaps recognizing the difficulty with a rule that would require an indictment to lay out all of the facts that a grand jury may have found, respondent asserts (Supp. Br. 6-7) that it would have been sufficient for the indictment in this case to allege that respondent "tender[ed] false identification," without more specifically alleging that respondent "show[ed] a laminated, 2 inch by 3 inch red and white Arizona driver's license in the name of his cousin, which he had obtained three days earlier." Respondent, however, offers no principle to limit how much factual detail is required to satisfy the requirement of "descend[ing] to the particulars."

[3] Respondent contends that "the prosecution must, at a minimum, identify the manner and means by which the defendant violated the

Respondent contends that the indictment in this case "nowhere descends to the particulars of the charged offense." Supp. Br. 7. That contention, however, overlooks the fact that the indictment specified (1) the date of the attempted unlawful reentry ("[o]n or about June 1, 2003") and (2) the place of the attempted unlawful reentry ("at or near San Luis in the District of Arizona"). J.A. 8. Respondent does not deny that those factual details were sufficient to enable him to prepare his defense. Nor could he do so, particularly in light of the reality that (as respondent appears to concede, see Supp. Br. 7) an individual could use only a limited number of means to attempt to effectuate unlawful reentry at the border—particularly where (as here) the individ-

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statute." Supp. Br. 2. The sole authority that respondent cites for that proposition—the Second Circuit's decision in *United States* v. *Stavroulakis*, 952 F.2d 686, cert. denied, 504 U.S. 926 (1992)—does not support it. Although the indictment in question did provide a "brief explanation of how [the defendant] attempted to execute the scheme," *id.* at 693, the Second Circuit, in upholding the indictment against challenge on other grounds, merely reaffirmed the proposition (hardly helpful to respondent) that "an indictment need do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime," *ibid.* (citation omitted). The court added that, "[w]hen an indictment delineates the elements of a charged offense, however concisely, the underlying concerns of proper pleading—notice of the charge to be met and protection against double jeopardy—may be further promoted by a bill of particulars or pre-trial discovery." *Ibid.* Although (as respondent notes, see Supp. Br. 2) *Stavroulakis* itself cited Federal Rule of Criminal Procedure 7(c)(1) and a treatise on civil procedure, it did so only for the proposition (also unhelpful to respondent) that "[t]he Federal Rules of Criminal Procedure encourage succinct criminal pleadings." *Stavroulakis*, 952 F.2d at 693; cf. Fed. R. Crim. P. 7(c)(1) (stating that an indictment "may allege that the means by which the defendant committed the offense are *unknown*") (emphasis added).

ual is attempting to reenter at an official port of entry. The indictment in this case therefore provided constitutionally sufficient notice.

Again citing *Russell*, respondent contends that "a bill of particulars cannot save an invalid indictment," Supp. Br. 3 (quoting 369 U.S. at 770), and that a prosecutor cannot "demand that the defense (through discovery and motions) and the courts (through resolution of those motions) extract [factual] specifics" concerning the charged offense, *ibid.* It is true that a bill of particulars and discovery cannot render valid a fatally insufficient indictment. But a bill of particulars, discovery, or other information from the prosecution can defeat a defendant's later claim of prejudice from an indictment that otherwise might provide insufficient notice. This case is a perfect example: respondent has conceded that he received notice of the government's evidence concerning his actions at the border when the government disclosed that evidence in discovery. See Oral Arg. Tr. 34. It is unnecessary in this case, however, to analyze whether respondent suffered prejudice from any deficiency, because the indictment in fact provided sufficient detail to allow respondent to frame his defense.

3. Finally, respondent contends that the offense of attempted unlawful reentry under 8 U.S.C. 1326(a) requires proof of "specific intent": *i.e.*, proof not only that the defendant had the intent to reenter the country, but also that the defendant had knowledge that he lacked the consent of the Attorney General (or the Secretary of the Department of Homeland Security) to reenter. See Supp. Br. 16-25. As respondent concedes (*id.* at 16), however, no question concerning the intent element of the offense of attempted unlawful reentry is presented in this case. Consistent with the Ninth Circuit's decision

in *United States* v. *Gracidas-Ulibarry*, 231 F.3d 1188 (2000) (en banc), the indictment in this case alleged that respondent "*knowingly* and intentionally attempted" to reenter the country unlawfully. J.A. 8 (emphasis added). As respondent also concedes (Supp. Br. 16 n.9), respondent did not claim in the court of appeals that the indictment was deficient because it did not more specifically allege that respondent possessed "specific intent." Nor did respondent clearly advance such a claim in the district court. See J.A. 10 (contending, in motion to dismiss indictment, only that the indictment was defective "because it does not allege or state any facts concerning the overt act necessary for the 'attempt' prong of § 1326"); J.A. 23 (contending, at argument before the district court, that the indictment failed to identify "the facts of the specific intent"). This Court therefore need not consider the degree of intent required for attempted unlawful reentry in determining whether the indictment in this case was valid under the Fifth Amendment.

In any event, attempted unlawful reentry under 8 U.S.C. 1326(a) requires a showing only that the defendant intended to reenter the country, and does not require an additional showing that the defendant had knowledge that he lacked the consent of the Attorney General (or the Secretary of the Department of Homeland Security) to reenter. Nothing in the text of the statute suggests the latter requirement, and it is settled law that the corresponding substantive offense of unlawful reentry requires only an intent to reenter the country. See *United States* v. *Carlos-Colmenares*, 253 F.3d 276, 277 (7th Cir.) (citing cases), cert. denied, 534 U.S. 914 (2001). Respondent asserts (Supp. Br. 5, 17-19) that "specific intent" is implicit in common-law attempt. But respondent fails to establish the insufficiency of a show-

ing of a specific *intent to enter*. A person with that intent who takes a substantial step towards his goal is not committing a "strict liability" crime, as respondent suggests. See Supp. Br. 24. And nothing in the common law or Section 1326(a) indicates that, in order to establish "specific intent," the government is required to prove that a defendant knew that he lacked consent to reenter.[4]

Accordingly, a number of circuits have rejected the argument that the offense of attempted unlawful reentry requires a defendant to know that he lacked consent to reenter. See *United States* v. *Rodriguez*, 416 F.3d 123, 125-128 (2d Cir. 2005), cert. denied, 126 S. Ct. 1142 (2006); *United States* v. *Morales-Palacios*, 369 F.3d 442, 445-448 (5th Cir.), cert. denied, 543 U.S. 825 (2004); *United States* v. *De León*, 270 F.3d 90, 92 (1st Cir. 2001); *United States* v. *Peralt-Reyes*, 131 F.3d 956, 957 (11th Cir. 1997) (per curiam), cert. denied, 523 U.S. 1087 (1998). Even the Ninth Circuit's decision in *Gracidas-*

[4] To the extent that respondent suggests that a defendant need know not only that he *lacked* consent to reenter, but also that he *needed* consent to reenter, such a requirement would amount to a mistake-of-law defense to a Section 1326(a) attempt charge—in contravention of the "general rule" that "ignorance of the law or a mistake of law is no defense to criminal prosecution." *Cheek* v. *United States*, 498 U.S. 192, 199 (1991). In any event, the only persons subject to prosecution under Section 1326(a) are aliens who "ha[ve] been denied admission, excluded, deported, or removed or ha[ve] departed the United States while an order of exclusion, deportation, or removal is outstanding." Those persons can be charged with knowledge of their ineligibility to reenter the United States without official authorization. Cf. *Morales-Palacios*, 369 F.3d at 448 (noting that "a previously deported alien has a unique set of knowledge that might not otherwise exist for defendants in traditional common law crimes; upon being deported, an alien has been given both oral and written notice that he or she cannot reenter without * * * express permission").

Ulibarry does not squarely address whether a defendant may avoid liability under Section 1326(a) by showing that he did not know that he lacked consent to reenter the country. The defendant there admitted knowing that he lacked consent; his defense was that he did not have *any* intent to reenter the country, because he was asleep at the time he was driven to a port of entry. See 231 F.3d at 1191, 1197.

In this case, however, the only question properly before the Court is whether the court of appeals correctly applied a rule of automatic reversal after determining that the indictment failed sufficiently to allege the *conduct* element of the offense of attempted unlawful reentry. See Pet. App. 3a-6a. To reverse the decision of the court of appeals, this Court need only conclude either that the indictment was not deficient in the first place, or that, even assuming that the indictment was deficient, any error was harmless because a properly instructed petit jury returned a guilty verdict. Both of those conclusions are warranted; either would justify reversal.

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For the foregoing reasons and those stated in the government's opening, reply, and supplemental briefs, the judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

NOVEMBER 2006